

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In re Application of	)	
	)	
<b>Board of Trustees, Davis &amp; Elkins College</b>	)	Facility I.D. No. 4298
	)	NAL/Acct. No. MB-200641410067
For Renewal of License for	)	FRN: 0010044980
Station WCDE(FM)	)	File No. BRED-20040107AAJ
Elkins, West Virginia	)	

**MEMORANDUM OPINION AND ORDER  
AND  
NOTICE OF APPARENT LIABILITY FOR FORFEITURE**

**Adopted: September 25, 2006**

**Released: September 27, 2006**

By the Chief, Media Bureau:

**I. INTRODUCTION**

1. The Commission has before it the captioned application of the Board of Trustees, Davis & Elkins College (the "Licensee"), for renewal of its license for Station WCDE(FM), Elkins, West Virginia (the "Station"). In this *Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture* ("NAL") issued pursuant to Sections 309(k) and 503(b) of the Communications Act of 1934, as amended (the "Act"), and Section 1.80 of the Commission's Rules (the "Rules"),<sup>1</sup> by the Chief, Media Bureau by authority delegated under Section 0.283 of the Rules,<sup>2</sup> we find that the Licensee apparently willfully violated Section 73.3539 of the Rules,<sup>3</sup> by failing to timely file a license renewal application for the Station, and willfully and repeatedly violated Section 301 of the Act,<sup>4</sup> by engaging in unauthorized operation of the Station after its authorization had expired. Based upon our review of the facts and circumstances before us, we conclude that the Licensee is apparently liable for a monetary forfeiture in the amount of seven thousand dollars (\$7,000), and we grant the captioned WCDE(FM) renewal application.

**II. BACKGROUND**

2. Section 73.3539(a) of the Rules requires that applications for renewal of license for broadcast stations must be filed "not later than the first day of the fourth full calendar month prior to the expiration date of the license sought to be renewed."<sup>5</sup> An application for renewal of WCDE(FM)'s license should have been filed by June 1, 2003, four months prior to the Station's October 1, 2003, license expiration date,<sup>6</sup> but was not. Accordingly, on December 3, 2003, the staff wrote to the Licensee

<sup>1</sup> 47 U.S.C. §§ 309(k), 503(b); 47 C.F.R. § 1.80.

<sup>2</sup> See 47 C.F.R. § 0.283.

<sup>3</sup> See 47 C.F.R. § 73.3539.

<sup>4</sup> See 47 U.S.C. § 301.

<sup>5</sup> 47 C.F.R. § 73.3539(a).

<sup>6</sup> See 47 C.F.R. §§ 73.1020, 73.3539(a).

indicating that the Station's license had expired and that (1) all authority to operate the Station was terminated; and (2) the Station's call letters were deleted from the Commission's data base. The Licensee was advised that any operation of the Station was then unauthorized and must cease immediately.<sup>7</sup> Upon receipt of the letter, the Licensee tendered the captioned license renewal application<sup>8</sup> and a request for Special Temporary Authorization ("STA") for WCDE(FM) to continue operating, pending consideration of the late-filed renewal application. The staff granted that STA request on January 9, 2004.<sup>9</sup> By the terms of that letter, the authority expired on July 9, 2004. The Licensee failed to timely seek an extension of the STA, and it did not file for further authority to continue WCDE(FM)'s operations until April 17, 2006, which the staff granted on April 27, 2006.<sup>10</sup>

### III. DISCUSSION

3. *Proposed Forfeiture.* In this case, the Licensee has admitted that it failed to timely file a license renewal application for WCDE(FM), as required by Section 73.3539(a) of the Rules. Moreover, it does not dispute that it continued Station operation for more than three months after its license had expired on October 1, 2003 before filing the STA request and renewal application, and for nearly two years after its initial STA had expired.

4. This *NAL* is issued pursuant to Section 503(b)(1)(B) of the Act. Under that provision, any person who is determined by the Commission to have willfully or repeatedly failed to comply with any provision of the Act or any rule, regulation, or order issued by the Commission shall be liable to the United States for a forfeiture penalty.<sup>11</sup> Section 312(f)(1) of the Act defines willful as "the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate" the law.<sup>12</sup> The legislative history to Section 312(f)(1) of the Act clarifies that this definition of willful applies to both Sections 312 and 503(b) of the Act,<sup>13</sup> and the Commission has so interpreted the term in the Section 503(b) context.<sup>14</sup> Section 312(f)(2) of the Act provides that "[t]he term 'repeated,' when used with reference to the commission or omission of any act, means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day."<sup>15</sup>

5. The Commission's *Forfeiture Policy Statement* and Section 1.80(b)(4) of the Rules establish a base forfeiture amount of \$3,000 for the failure to file a required form.<sup>16</sup> The guidelines also specify a base forfeiture amount of \$10,000 for construction and/or operation without an instrument of

<sup>7</sup> Letter to Davis & Elkins College from Chief, Audio Division, Ref. 1800B3-DW (Dec. 3, 2003).

<sup>8</sup> File No. BR-20040107AAJ.

<sup>9</sup> Letter to Scott D. Goddard, Assistant Dean of Students, Davis & Elkins College, from Chief, Audio Division Reference 1800B3-MFW (Jan. 9, 2004).

<sup>10</sup> Letter to Stephen Bright, Vice President for Finance and Administration, Davis & Elkins College, Reference 1800B3-MFW (MB Apr. 26, 2006).

<sup>11</sup> 47 U.S.C. § 503(b)(1)(B). See also 47 C.F.R. 1.80(a)(1).

<sup>12</sup> 47 U.S.C. § 312(f)(1).

<sup>13</sup> See H.R. Rep. No. 97-765, 97<sup>th</sup> Cong. 2d Sess. 51 (1982).

<sup>14</sup> See *Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991).

<sup>15</sup> 47 U.S.C. § 312(f)(2).

<sup>16</sup> See *Forfeiture Policy Statement and Amendment of Section 1.80(b) of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087, 17113-15 (1997) ("*Forfeiture Policy Statement*"), recon. denied, 15 FCC Rcd 303 (1999); 47 C.F.R. § 1.80(b)(4), note to paragraph (b)(4), Section I.

authorization for the service.<sup>17</sup> In determining the appropriate forfeiture amount, we must consider the factors enumerated in Section 503(b)(2)(D) of the Act, including “the nature, circumstances, extent and gravity of the violation, and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.”<sup>18</sup>

6. In this case, the Licensee failed to timely file the WCDE(FM) renewal application and continued Station operations for more than three months before filing an STA request and the appropriate renewal application, and for more than two years after its initial STA expired. Nevertheless, because it had previously been licensed to operate Station WCDE(FM), the latter transgression is not comparable to “pirate” wireless operations, which typically have been subject to forfeitures of approximately \$10,000. Taking into consideration these facts and all of the factors required by Section 503(b)(2)(D) of the Act and the *Forfeiture Policy Statement*, we propose a forfeiture for the full \$3,000 amount for the failure to timely file the renewal application and STA request, but reduce the proposed forfeiture for the unauthorized operation from the \$10,000 base amount to \$4,000.<sup>19</sup> Thus, we propose a forfeiture in the total amount of \$7,000.

7. *License Renewal Application.* In evaluating an application for license renewal, the Commission’s decision is governed by Section 309(k) of the Act.<sup>20</sup> That section provides that if, upon consideration of the application and pleadings, we find that (1) the station has served the public interest, convenience, and necessity; (2) there have been no serious violations of the Act or the Rules; and (3) there have been no other violations which, taken together, constitute a pattern of abuse, we are to grant the renewal application.<sup>21</sup> If, however, the licensee fails to meet that standard, the Commission may deny the application – after notice and opportunity for a hearing under Section 309(e) of the Act – or grant the application “on terms and conditions that are appropriate, including a renewal for a term less than the maximum otherwise permitted.”<sup>22</sup>

8. We find that the Licensee’s apparent violations of Section 73.3539 of the Rules and Section 301 of the Act do not constitute “serious violations” warranting designation for evidentiary hearing. Moreover, we find no evidence of violations that, when considered together, evidence a pattern

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<sup>17</sup> A broadcast station requires an authorization from the Commission to operate. See 47 U.S.C. § 301.

<sup>18</sup> 47 U.S.C. § 503(b)(2)(D); see also *Forfeiture Policy Statement*, 12 FCC Rcd at 17100; 47 C.F.R. § 1.80(b)(4).

<sup>19</sup> See, e.g., *Discussion Radio Incorporated*, 19 FCC Rcd 7433, 7438 (2004); *Gospel Media, Inc.*, 19 FCC Rcd 15600 (MB 2004). Although in *Gospel Media*, the Bureau imposed a proposed forfeiture of \$3,000 for unauthorized operation, the unauthorized operation lasted only two weeks and the applicant did not allow its STA for continued operations to expire. The \$4,000 forfeiture proposed here for unauthorized operation is analogous to use of an unauthorized frequency by a land mobile station holding a license for a different frequency. See, e.g., *In the Matter of Dave Mitchell*, DA 05-110, 2005 WL 123922 (EB Rel. Jan. 21, 2005); *In the Matter of Joselyn Gordon*, 19 FCC Rcd 23557 (EB 2004).

<sup>20</sup> 47 U.S.C. § 309(k).

<sup>21</sup> 47 U.S.C. § 309(k)(1). The renewal standard was amended to read as described by Section 204(a) of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996). See *Implementation of Sections 204(a) and 204(c) of the Telecommunications Act of 1996 (Broadcast License Renewal Procedures)*, Order, 11 FCC Rcd 6363 (1996).

<sup>22</sup> 47 U.S.C. §§ 309(k)(2), 309(k)(3).

of abuse.<sup>23</sup> Further, we find that Station WCDE(FM) served the public interest, convenience, and necessity during the subject license term. We will therefore grant the license renewal application below.

#### IV. ORDERING CLAUSES

9. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Section 1.80 of the Commission's Rules, that the Board of Trustees, Davis & Elkins College is hereby NOTIFIED of its APPARENT LIABILITY FOR FORFEITURE in the amount of seven thousand dollars (\$7,000) for its apparent willful violation of Section 73.3539 of the Commission's Rules and willful and repeated violation of Section 301 of the Communications Act of 1934, as amended.

10. IT IS FURTHER ORDERED, pursuant to Section 1.80 of the Commission's Rules, that, within thirty (30) days of the release date of this *NAL*, the Board of Trustees, Davis & Elkins College SHALL PAY the full amount of the proposed forfeiture or SHALL FILE a written statement seeking reduction or cancellation of the proposed forfeiture.

11. Payment of the proposed forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the *NAL*/Acct. No. and FRN No. referenced above. Payment by check or money order may be mailed to Federal Communications Commission, at P.O. Box 358340, Pittsburgh, Pennsylvania 15251-8340. Payment by overnight mail may be sent to Mellon Bank/LB 358340, 500 Ross Street, Room 1540670, Pittsburgh, Pennsylvania 15251. Payment by wire transfer may be made to ABA Number 043000261, receiving bank Mellon Bank, and account number 911-6106.

12. The response, if any, must be mailed to Office of the Secretary, Federal Communications Commission, 445 12<sup>th</sup> Street, S.W., Washington D.C. 20554, ATTN: Peter H. Doyle, Chief, Audio Division, Media Bureau, and MUST INCLUDE the *NAL*/Acct. No. referenced above.

13. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the respondent submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices ("GAAP"); or (3) some other reliable and objective documentation that accurately reflects the respondent's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

14. Requests for full payment of the forfeiture proposed in this *NAL* under the installment plan should be sent to: Associate Managing Director-Financial Operations, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554.<sup>24</sup>

15. IT IS FURTHER ORDERED, pursuant to Section 309(k) of the Communications Act of 1934, as amended, that the license renewal application of the Board of Trustees, Davis & Elkins College for Station WCDE(FM), Elkins, West Virginia (File No. BRED-20040107AAJ) IS GRANTED.

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<sup>23</sup> For example, we do not find here that the Licensee's Station operation "was conducted in an exceedingly careless, inept and negligent manner and that the licensee is either incapable of correcting or unwilling to correct the operating deficiencies." See *Heart of the Black Hills Stations*, 32 FCC 2d 196, 198 (1971). Nor do we find on the record here that "the number, nature and extent" of the violations indicate that "the licensee cannot be relied upon to operate [the station] in the future in accordance with the requirements of its licenses and the Commission's Rules." *Heart of the Black Hills Stations*, 32 FCC 2d at 200. See also *Center for Study and Application of Black Economic Development*, 6 FCC Rcd 4622 (1991), *Calvary Educational Broadcasting Network, Inc.*, 7 FCC Rcd 4037 (1992).

<sup>24</sup> See 47 C.F.R. § 1.1914.

16. IT IS FURTHER ORDERED that a copy of this *NAL* shall be sent, by First Class and Certified Mail, Return Receipt Requested, to the Board of Trustees, Davis & Elkins College, c/o Scott Douglas Goddard, 100 Campus Drive, Elkins, West Virginia, 26241.

FEDERAL COMMUNICATIONS COMMISSION

Donna C. Gregg  
Chief, Media Bureau